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NOTE AND COMMENT.

THE POWER OF A COURT TO COMPEL A JURY TO RENDER ITS VERDICT IN ACCORDANCE WITH A PEREMPTORY INSTRUCTION.—A recent occurrence in one of the trial courts of Missouri has occasioned considerable newspaper comment and awakened a definite interest on the part of lawyers and laymen alike. In the trial, before one of the courts in St. Louis, of a case wherein the issue was the validity of a certain will the court directed the jury to return a verdict for the defendant on the ground, according to newspaper report, that the evidence of undue influence was insufficient to warrant a verdict for the plaintiff. The jury refused to obey the instruction of the court, and, again according to newspaper report, after long deliberation returned a verdict contrary to the direction.

On the seventeenth day of December the following editorial appeared in one of our metropolitan newspapers:

"There is nothing surprising in the 'victory' of the 'striking' St. Louis jury. When the judge who had threatened the jurors with fines and jail sentences for 'contempt' examined the Supreme Court decisions of his State—and of other states, no doubt—he found that the jury was not bound to render a 'directed' verdict.

"The judge has the right to take a case from a jury. He has the right to set a verdict aside as being contrary to the weight of evidence. But he has no right to 'direct' a verdict, if the jury disagrees with him. The directing of verdicts regardless of the jury's own opinions and sentiments is an abuse. It makes a mockery of trial by jury.

"The St. Louis jury may have been wrong in its view of the case. But it was right in insisting on giving its own verdict. It was justified in 'standing on its legal rights' and resenting dictation and usurpation."

Coming at a time when so much criticism of the judiciary is being offered, this editorial deserves consideration. Is it, like some of the other criticisms, made by laymen on the judiciary, a just one, or is it, like much of such criticism, founded on a misconception and misunderstanding of the situation criticised, and consequently entirely unjust? What are the "legal rights" of a juror and the powers of a judge in cases like the one under discussion?

First, let us consider the court's duty in the matter of directing a verdict. The rule, as announced by the courts of Missouri, is that where the evidence offered is of such a character that the trial judge would have a plain duty to perform in setting aside a verdict for the plaintiff as unsupported by the evidence, it is his duty to interfere before a general submission to the jury and direct a verdict for the defendant. *Hite v. Street Railway Co.* (1895), 130 Mo. 132; *Jackson v. Hardin* (1884), 83 Mo. 175; *Powell v. Railroad* (1882), 76 Mo. 80; *Reichenbach v. Ellerbe* (1893), 115 Mo. 588. This rule is not peculiar to Missouri, but is followed by the Federal courts and the courts of many other States. *Bagley v. Cleveland Rolling Mill Co.* (1884), 21 Fed. 159; *Herbert v. Butler* (1877), 97 U. S. 319; *Cooper v. Waldron* (1862), 50 Me. 80; *Wilds v. Railroad Co.* (1862), 24 N. Y. 430; *Bean v. Missouri Lumber Co.* (1909), 40 Mont. 31; *McFadden v. Buckley* (Miss. 1910), 53 South. 351; *Blossi v. Chicago & N. W. R. R. Co.* (1909), 144 Iowa 697, 123 N. W. 360. Of course, there is nothing peculiar about a will contest case to make it an exception to the rule above set forth and Missouri authority is not wanting that the rule is applied as above stated where the plaintiff contests a will on the ground that it is void because of undue influence. *Sehr v. Lindemann* (1899), 153 Mo. 276; *Hamburger v. Rinkel* (1901), 164 Mo. 398.

Assuming on the authority of the foregoing cases that the duty of directing a verdict is imposed on a court where the evidence is insufficient to support any other verdict, it remains to inquire how the court shall proceed in performing this duty. In some jurisdictions it has been held that where the plaintiff's evidence makes no case against the defendant, the defendant's proper remedy is to ask the court to direct the jury to return a verdict for him, and it is error, though not reversible, if the correct result is reached, for the court to withdraw the case from the jury and render judgment for the defendant without any finding of court or jury. *Enger v. Ohio & Mississippi Ry. Co.* (1895), 142 Ind. 618; *Stroble v. City of New Albany* (1895), 144 Ind. 695; *City of Plymouth v. Milner* (1888), 117 Ind. 324; *Duluth Chamber of Commerce v. Knowlton* (1889), 42 Minn. 229; *Gilbert v. Finch* (1902), 76 N. Y. Supp. 143. In the latter case at the the close of the evidence each party moved for the direction of a verdict; the trial court denied these motions

and submitted the case to the jury. The jury were unable to agree and were discharged by consent of all the parties, after which the court directed a verdict for the defendants, to which act of the court an exception was taken by the plaintiff. On appeal the Supreme Court said, "There can, from the very nature of things, be no such thing as a verdict directed unless both the court and jury are present, because in such verdict there is involved an order by the court and an execution of the same by the jury. Once a jury has been discharged, the court has no power to direct a verdict because there is not only no one to direct, but no one to execute the direction. Therefore, the exception taken to the direction in this case would, in and of itself, necessitate a reversal of the judgment appealed from were it not for the fact that it was conceded upon the argument before us that the objection made and exception taken were not directed to the practice adopted."

It is true that the courts of some other jurisdictions take the view that if one party to an action is, on the evidence, entitled to a judgment as a matter of law, the taking of a verdict in his favor is an unnecessary formality and so in such a case the court may discharge the jury and order the clerk to enter judgment for such party. *Bemis v. Woodworth* (1878), 49 Iowa 340; *Murray v. Bush* (1902), 29 Wash. 662. This rule has even been applied in a case where the defendant's motion to direct a verdict was denied and the case submitted to the jury and then, when the jury failed to agree, the trial court dismissed the jury and entered judgment for the defendant. In discussing this matter of practice the higher court on appeal said, "The case turned on a question of law, therefore a verdict, though it would have been proper, was not necessary." *Calteaux v. Mueller* (1899), 102 Wis. 525. See also *Gammon v. Abrams* (1881), 53 Wis. 323, where the court said, "If the court had the power to so direct the jury, then certainly it had the power, in a more direct manner, to reach substantially the same result by finding the fact upon the undisputed evidence for itself, and rendering judgment accordingly." The Washington cases, including the one above cited, are governed by a statute, § 4994 of Ballinger's Codes, providing that in cases where the court shall decide as a matter of law what verdict shall be found, the court shall "discharge the jury from further consideration of the case and direct judgment to be entered in accordance with its decisions." It is to be noted that in not one of these cases, above cited, holding that the court may discharge the jury and render judgment, does anything appear which militates against the right and power of the court to direct a verdict if it chooses, except perhaps in the Washington cases, and this, as we have explained, is due to a statute on the subject which may be regarded as mandatory. Indeed, in the *Murray* case, cited above, the Wisconsin court indicated that the practice of directing the jury to return a certain verdict would have been, under the circumstances, the usual and preferable mode of attaining the result sought.

An interesting case on the right of the court to direct a verdict is that of *Grimes Dry Goods Co. v. Malcolm* (1893), 58 Fed. 670, affirmed in 164 U. S. 483. In this case it was near the adjourning hour of the court when the arguments of counsel were finished. The parties agreed in open court that

the case should be submitted to the jury at once and, in the event that the jury agreed, they might seal their verdict and give it to the foreman to be reported at the opening of court on the following morning. The jury agreed upon a verdict for the interpleader in the suit, sealed the same and left it with the foreman. The following morning in court, before the report and entry of this verdict, one of the jurors asked permission of the court to change his vote of the evening before. The court refused this permission, ordered the foreman to hand the sealed verdict to the clerk, and the clerk to read it. The verdict as read was entered of record over the objection of plaintiff's counsel. On writ of error to the Circuit Court of Appeals, Eighth Circuit, the court found that there was no evidence tending in the slightest degree to impeach the interpleader's title and that the trial judge should have directed the verdict for the interpleader, and said that it was not error for the court to direct one juror to do what it ought to have directed all of them to do before leaving their box." This position was sustained by the Supreme Court of the United States. See the foregoing citation.

Conceding, as we seem bound to do, that according to all the cases the court has the right, and according to many the duty, to direct the jury to return a certain verdict, we come naturally to the question, has the court the right and power to force the jury to obey such an order, or instruction? We believe this question should be answered affirmatively, and authority is not wanting to support this conclusion. One of the best authorities on this point is the case of *Cahill v. Chicago, Milwaukee & St. Paul Ry. Co.* (1896), 74 Fed. 285, 20 C. C. A. 184. This was an action against the defendant for an injury charged to have been caused by its carelessness and negligence. At the close of the evidence the court directed the jury to return a verdict for the defendant. This the jurors, severally stating that they could not conscientiously render such a verdict, refused to do. The court then ordered them to go to their room and return such a verdict as they might find. Later the jurors were brought into the courtroom and directed by the court to find a verdict for the defendant; this, one juror refused to do, and the court thereupon permitted counsel for the plaintiff to stipulate of record that a judgment of dismissal might be entered, to have the same force and effect, and none other, that a verdict for the defendant under the direction of the court would have, but that the plaintiff should be considered as excepting to such direction, and also to such order of dismissal. Thereupon the court ordered such dismissal and the plaintiff excepted to such ruling. In commenting on this situation the Circuit Court of Appeals said, "The stipulation should not have been accepted. The authority and duty of a judge to direct a verdict for one party or the other, where, in his opinion, the state of the evidence requires it, is beyond dispute; and it is not for the jurors to disobey, nor for attorneys to object, except in the orderly way necessary to save the right to prosecute a writ of error. The conduct of the juror in this instance was in the highest degree reprehensible and *might well have subjected him, and any who encouraged him to persist in his course, to punishment for contempt.* * * * We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no

doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury. Until a case has been submitted to the jury for its decision upon disputed facts, the authority of the court, for all the purposes of the trial, is, at every step, necessarily absolute; and its ruling upon every proposition, including the question whether, upon the evidence, the case is one for the jury, must be conclusive until, upon writ of error, it shall be set aside."

Another case of equal importance on the power of the court to compel the jury to return a verdict in accordance with its instruction is that of *Curran v. Stein* (1901), 110 Ky. 99. The defendant in this case moved for a peremptory instruction at the close of the evidence. The court sustained the motion and instructed the jury to find for the defendant. At the time the court gave this instruction a number of jurors severally declined to sign a verdict for the defendant. Thereupon the judge ordered the jury to retire to the jury-room and return a verdict as directed, threatening them with punishment if they failed to do so. The jury retired and after some time returned into court and reported that "in obedience to the peremptory instruction of the court, we, the jury, find for the defendants." One of the errors assigned and argued in the higher court was the action of the trial court in interfering with the freedom of the jury's deliberation by requiring them to return a verdict which they were unwilling to render. On this point the higher court said, "There was no error of the court in requiring the jury to obey his instructions."

In still another case, *Houston v. Potts* (1871), 65 N. C. 41, the jury returned a verdict for the amount of the face of the bond sued on without interest and the trial court entered judgment for that amount. The Supreme Court of North Carolina, in reversing the case, held that the trial court should have directed a verdict for the plaintiff in the sum of the bond with interest, and said, "If the jury had persisted in rendering a different verdict, it would have become his duty to set aside the verdict and fine the jury for contumacy."

These cases clearly indicate that a court has a right to force a juror to enter a verdict according to its instructions and to punish jurors who refuse to follow a peremptory instruction. And why should this not be so? The writer of the editorial hereinbefore referred to has entirely misconceived the effect or meaning of a verdict rendered under a peremptory instruction. It is not, and does not purport to be a determination of the merits of the case by the jury itself. The record shows that the verdict was given under the direction of the court when this has been the case, and the undeniable conclusion from such a record must be that the verdict was not necessarily an expression of the opinion of the jurors as to the merits of the case. A quotation from a case where the very State where the incident, which provoked this editorial, occurred, ought to clear up this misconception. In *Powell v. Railway Co.* (1882), 76 Mo. 80, the judge referring in his opinion to the direction of a verdict by the court said, "Such a direction to the jury does not usurp their province as triers of the facts; does not intermeddle with the facts, but

simply pronounces the law on the uncontroverted evidence; simply asserts the province and prerogative of the court to declare the inference which the law itself draws from undisputed facts; simply asserts that in point of law the evidence introduced by a party is insufficient to warrant a verdict in his favor and therefore directs a verdict for the opposite party." Perhaps the situation is made plainer by the language of the court in the Curran case, above cited, where it says, "The peremptory instruction of the court to the jury, like any other order the court may make in the case, must be obeyed. The verdict, though in form the act of the jury, is really the act of the court. *The court determines the case. The verdict of the jury is merely a form of putting of record the judgment which the court has given.* To hold that the jury may disobey the peremptory direction of the court would be to vest the jury with the power to review the decision of the court on the law of the case. In some jurisdictions the practice is for the court to discharge the jury and enter the judgment. The substance is the same when the jury find a verdict by the peremptory direction of the court. It is proper that the verdict, as in this case, should show on its face that it is made under the order of the court, for this relieves the jury of all responsibility of it."

If it is conceded that the Missouri court had power to force the jury to render a verdict according to its direction, it will scarcely be questioned that the weapon to force a contumacious jury to obey its order would be fine or imprisonment for contempt. Indeed, a general power to punish for contempt, which would include this case, is expressly given the Missouri courts by § 1616 of the REVISED STATUTES of 1899. This section of the statute has been declared to be unconstitutional because it abridges the inherent power of a court to summarily punish for certain sorts of contempt. *State v. Shepherd* (1903), 177 Mo. 205. But even in the absence of this statute the court could resort to its common law power of punishing for contempt, and this includes the power of punishing jurors for misconduct. *In re May* (1880), 1 Fed. 733.

It is much to be regretted that a supposedly conservative newspaper should in its editorial criticise unjustly and unfairly one of the trial courts of a neighboring city, and applaud the unlawful acts of obstreperous jurors in obstructing justice. The business of dispensing the news to a large number of readers and commenting on the happenings of the day with the purpose of influencing its readers to correct evils, stifle injustice and assist in advancing right is a serious and responsible task and calls for conservatism and fairness. Before making an attack on an institution so vital to our system of government an editorial writer should pause to consider the justice of the charges he is about to make. We regret that we must admit that there are some respects in which our courts deserve criticism and that there are evils in the conduct and procedure thereof for which the staunchest supporters of our judiciary are advocating remedies. But the admitted existence of such evils does not prove that no good can come out of our courts. The most that can be said for the instance at hand is that the procedure in directing a verdict is clumsy and perhaps archaic. If this be true the legislature has the power to remedy the defect by a statute similar to that adopted by the legislature of the State of Washington, and it should so remedy it. The trial

judge did exactly what any prudent judge would have done under the circumstances—directed the jury to render a verdict for the party who he believed was in law entitled to it. He did not wish to be the cause of a mistrial and as the higher courts of his State had not passed the validity of a verdict entered by the clerk at the direction of a judge or a judgment so entered without the rendition of a verdict by the jury, he did the prudent thing by adopting a practice which he knew could not be questioned. The jury by their obstinacy defeated his attempt to follow the law. Perhaps as much of the dissatisfaction with our courts can be traced to a general lack of confidence in the findings of juries as to any other source. It is an opinion not infrequently expressed that twelve men, selected practically at random and certainly without much reference to their qualifications often uneducated, and inexperienced, are not competent to decide matters in controversy according to the law and the evidence and not able, when a conclusion has been reached as to the facts established, to apply the law thereto under the instructions of the court. Surely this editorial, which encourages jurors to refuse to render a verdict as the court directs and thus to usurp the province of the court, will not assist in bettering this condition.

G. S.

THE LIABILITY OF MUNICIPAL CORPORATIONS IN THE DISCHARGE OF PUBLIC OR GOVERNMENTAL DUTIES AND OF PRIVATE OR CORPORATE DUTIES.—With respect to the general principles by which the liability of municipal corporations must be determined, the divergence of judicial opinion is not greater than might naturally be expected where the subject is so difficult and important, and the circumstances to which the principles are to be applied are so variant. These corporations are regarded with reference to some of their duties and functions as representing and acting for the state or sovereign, and with reference to others as acting for themselves, somewhat as private corporations; when acting in the former capacity they are generally not answerable for the acts or omissions of their officers or agents, but when acting in the latter capacity their liability is ordinarily the same as that of a private person or corporation. The great difficulty, and the great divergence of judicial opinion, arise from the fact that no test has been formulated by which to decide whether a particular act or omission occurred in the discharge of governmental or of quasi private duties. Thus in a recent case we find the Supreme Court of Mississippi declaring without the least hesitancy, that the driver of a city cart engaged in hauling trash and dirt for the city, is not engaged in a public or governmental duty so as to relieve the city of liability for an injury caused by his negligence in running over a child. *City of Pass Christian v. Fernandez* (Miss., 1911), 56 South. 329, 100 Miss. 76.

The test applied was that public or governmental duties of a city are those given by the state as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. One of the tests applied in New York is as follows, "To determine whether there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or nonfeasance is complained of, is a part